SUPREME COURT, U. S.

JUN 21 1961

JAMES R. BROWNING, Clerk

No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1961

CLEO E. LOVETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

HERBERT J. MILLER, JR.,
Assistant Attorney General,

BERNARD ROSENBERG,
Attorney,

Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	5

CITATIONS

Case:	
Holland v. *United States*, 348 U.S. 121	3, 4, 5
Statute:	
18 U.S.C. 371	2
Miscellaneous:	
Rule 30, F. R. Crim. P.	4

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 990

CLEO E. LOVETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 24-25) is reported at 287 F. 2d 810.

JURISDICTION

The judgment of the court of appeals was entered March 17, 1961 (Pet. App. 26). A petition for rehearing was denied on April 25, 1961 (Pet. App. 27). The petition for a writ of certiorari was filed May 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for conspiracy to violate the liquor laws, in which there was direct testimony of a person involved in the illegal operations, it was error for the district court to fail to give a charge that circumstantial evidence must exclude every reasonable hypothesis except that of guilt.

STATEMENT

Petitioner and others were convicted in the United States District Court for the Middle District of Alabama of conspiracy to violate the liquor laws (18 U.S.C. 371). Petitioner was sentenced to imprisonment for three years (R. 794-795). On appeal the conviction was affirmed (Pet. App. 26).

1. The evidence with respect to petitioner may be summarized as follows: One Robert Dale Nettles testified that, from February to June 1959, he worked with others for defendant Wood in the operation of illegal stills (R. 42, 46-47, 74-79, 86-88, 103). After one still in Alabama was raided, Wood, in Nettles' presence, made arrangements with petitioner to set up a still on or near petitioner's land in Georgia (R. 114-115), on which petitioner had said he could set up a pump and meter enclosed by a fence (R. 115). A new electric power pump and meter with an extension of hose to a still were in fact installed on petitioner's land (R. 120-121).[1] Nettles further

[1] Power company records confirmed the fact that a meter had been installed near petitioner's property in Bainbridge, Georgia (R. 220-228). The still was described by investiga-

testified that he hauled whiskey from the still (R. 141, 144) and from petitioner's feed mill, the key to which he had obtained from petitioner himself (R. 142-143). This still was also raided (R. 146). Later, Nettles worked for Wood and petitioner in running another still on land that petitioner was farming (R. 150-151). This third still was raided as well (R. 157).

2. After the district court had denied motions for judgment of acquittal, petitioner's present counsel, who represented Wood at the time, stated that he assumed that the judge would charge the jury that circumstantial evidence was to be received with caution (R. 733). The judge stated that such was not the law and that it was his understanding that it was no longer the rule that the jury should be told that circumstantial evidence had to exclude every "reasonable hypothesis" except guilt (R. 733-734). Although counsel for defendant Reeves had requested a charge on circumstantial evidence embodying the "reasonable hypothesis" theory (R. 784), counsel for Wood (petitioner's present counsel) stated that he understood the case of *Holland* v. *United States*, 348 U.S. 121, as having changed the law as to circumstantial evidence by leaving out the "reasonable hypotheses theory", but that he did not understand it to change the rule that circumstantial evidence should be viewed with caution (R. 734-735). The district judge again stated that he did not regard it as correct

---

tors who raided it (R. 471-474, 483-484) and by one who visited it after it had been abandoned (R. 230-237).

that "when a case is based upon circumstantial evidence, such as this case partly is," the jury should be told to consider the circumstantial evidence with caution (R. 735-736). The position of Wood's counsel was adopted by petitioner's trial counsel (see R. 770), but neither could offer case law in support of their view (R. 741-744, 747). After the court's charge, counsel expressed their satisfaction with it but reserved objection to the failure of the court to give their requested charges (R. 769-770).

ARGUMENT

1. Although petitioner seeks to raise the question whether, on the trial of charges other than income tax evasion, the jury must be instructed that circumstantial evidence must exclude every reasonable hypothesis except that of guilt,[2] that question is not really presented by this case at all, for, particularly in relation to petitioner, the case rested basically on the jury's estimate of the credibility of Nettles who *directly* implicated petitioner in the illegal liquor operations. Such circumstantial evidence as there was with respect to petitioner merely tended to confirm the truthfulness of Nettles' testimony.

2. In any event, the ruling in *Holland* v. *United States*, 348 U.S. 121, 139-140, "that where the jury is properly instructed on the standards for reasonable

---

[2] There is serious doubt whether this question was properly raised under Rule 30, F. R. Crim. P. (see Pet. App. 25; the Statement, *supra*, pp. 3-4), although this problem is not of moment in view of the other considerations discussed in the text, *infra*.

doubt, * * * an additional instruction on circumstantial evidence is confusing and incorrect," was clearly intended not to be limited to cases of income tax evasion, for the Court noted generally (*id.* at 140) that "[c]ircumstantial evidence * * * is intrinsically no different from testimonial evidence." Moreover, in light of the Court's strictures on the need for care in "net worth" cases (*id.* at 126-130), it seems evident that, had the Court thought that the rule for which petitioner contends was at all useful in clarifying issues for the jury, it certainly would have deemed it applicable in a "net worth" case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JUNE 1961.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1961 590-774 14-15